STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 94B039 & 94G019

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

REY-EL VENTA,

Complainant,

vs.

DEPARTMENT OF INSTITUTIONS,
DIVISION FOR DEVELOPMENTAL DISABILITIES,
WHEAT RIDGE REGIONAL CENTER,

Respondent.

The hearing convened on November 7, 1994, and concluded on January 20, 1995, with the submission of closing arguments by the parties. Complainant Rey-El Venta was present at the hearing and represented by Karen Yablonski-Toll, attorney at law. Respondent appeared through Stacy Worthington, assistant attorney general.

Complainant testified in her own behalf and called Chris M. Johnson, a registered occupational therapist, and George Kemper, program director for Wheat Ridge Regional Center (WRRC), to testify at hearing.

Respondent called the following employees of WRRC to testify at hearing: David Colagrosso, director of staff development and the staffing office, and Vernon Jackson, whose pertinent job titles are Equal Employment Opportunity officer and the American's with Disabilities Act coordinator.

Complainant's exhibits A through H, O and P were admitted into evidence without objection. Complainant's exhibit Q was admitted into evidence over respondent's objection. Complainant's exhibits I through N were not admitted into evidence. Respondent's exhibits 1 through 10 were admitted into evidence without objection. Respondent's exhibit 11 was admitted into evidence over complainant's objection.

MATTER APPEALED

Complainant appeals the termination of her employment under the provisions of Director's Procedure P7-2-5(D)(4)(b).

ISSUES

1. Whether the administrative law judge (ALJ) has jurisdiction to consider complainant's petition for hearing.

2. Whether respondent's action in placing complainant on leave in June, 1993, was arbitrary, capricious or contrary to rule or law.

3. Whether complainant was a qualified individual with a disability under the American's with Disabilities Act, 42 U.S.C. 12101, et. seq. (the Act or the ADA).

4. If so, whether respondent's medical disqualification of complainant was discriminatory on the basis of disability.

5. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. The ALJ ordered the consolidation of complainant's petition for hearing regarding respondent's action placing complainant on leave in June, 1993, and complainant's appeal of her termination from employment in August, 1993. The petition and the appeal shared common questions of law and fact. Consolidation of the cases was judicially economical and allowed for an orderly and logical review of the issues.

2. Complainant's request to sequester the witnesses from the hearing room was granted.

3. Complainant called as a witness at hearing Chris Johnson, a registered occupational therapist. Respondent stipulated that Chris Johnson would be recognized at hearing as an expert in the field of making determinations with regard to essential job functions.

4. Respondent moved to dismiss the appeal at the conclusion of complainant's case in chief. Respondent argued that complainant failed to sustain her burden of proof to establish that she had a right to relief. Respondent asserts that with regard to complainant's claim for relief under the Act, complainant failed to establish that she had a disability. Respondent maintained that complainant failed to show that her disability was substantial in that it constituted a far reaching disability. Respondent further argued that complainant failed to establish that she could perform the essential job functions of the developmental disability technician (DDT) and cook positions. Respondent contended that since complainant failed to establish these facts, she failed to establish a prima facie case, and therefore the appeal should be dismissed.

Finally, respondent argued that the appointing authority properly terminated complainant's employment, and therefore there can be no finding that there was an improper delegation of appointing

authority.

Complainant maintained that she established that she is a qualified individual with a disability. Complainant maintained that it was established that her back injury substantially limited major life activities. In addition, complainant argued that she is an individual who is recognized by respondent as having a disability. It was complainant's contention that this evidence was adequate to establish a prima facie case of disability discrimination.

The ALJ ruled that complainant made a prima facie showing that she may be entitled to relief under the Act. Therefore, respondent's motion to dismiss was denied.

5. At hearing on December 14, 1994, complainant requested that the hearing remain open for the purpose of allowing her to call Carla Beeman as a witness. Respondent objected to complainant's request. Respondent argued that complainant failed to properly endorse the witness prior to hearing. Respondent claimed that it would be unfairly prejudiced if the witness was permitted to testify. Further, respondent maintained that complainant did not subpoena the witness to appear at the scheduled hearing dates and therefore a continuance of the hearing should not be granted to obtain the witness's testimony.

The ALJ ruled that the hearing would not be held open for complainant's witness to testify, because the witness was not properly endorsed or subpoenaed to appear at the hearing.

FINDINGS OF FACT

1. Complainant Rey-El Venta began her employment at WRRC in February, 1989, as an unlicensed aide providing direct care to clients. In 1991, Venta became licensed as a psychiatric technician or DDT. The State Department of Personnel classification title, DDT, is licensed by the State Board of Nursing as psychiatric technician. In the state system, reference to the position of licensed psychiatric technician and DDT refer to the same position. Venta was promoted to the position of a licensed psychiatric technician 1B in 1991.

2. Satellite homes are maintained by WRRC. These residences are scattered throughout the west side of the metropolitan area where developmentally disabled individuals live together in small groups. Their special needs are met by the staff of WRRC. Satellite homes house ambulatory and non-ambulatory clients. Satellite homes do not remain static in terms of their designation as homes for ambulatory or non-ambulatory clients. The needs of the clients served by WRRC determine how clients are assigned to satellite homes. The clients served by WRRC are, for the most part, severely physically or mentally disabled.

3. Venta was initially assigned to the Secrest satellite house (Secrest). Residents of Secrest were primarily ambulatory geriatric clients. At Secrest, in April, 1990, Venta suffered a back injury during the performance of her duties. She took several days off from work to heal that injury, and then returned to her position.

4. In 1992, Venta was assigned as the acting senior DDT at the 67th Street satellite house (67th Street). 67th Street was made up predominantly of ambulatory clients. After Venta's assignment to the residence, it was changed to accommodate primarily non-ambulatory clients.

5. As a DDT, Venta was responsible for spending seventy percent of her time in resident care, active treatment, guardianship and training, with another ten percent of her time spent in housekeeping, sanitation and safety. As a DDT, Venta was expected to have the ability to lift 50 pounds.

6. In June, 1992, Venta suffered a second back injury during the performance of her duties. Venta suffered this injury when she was assisting a client in moving from a wheelchair to the client's bed. Venta took one month off from work to recover from this injury. When Venta returned to work, she was placed on light duty. Her physician identified restrictions on her ability to perform physical tasks. Venta's physician directed her to limit lifting to 20 pounds occasionally, and that she was unable to bend or twist at the waist.

7. WRRC developed occupational standards that described the physical functions of the DDT position. WRRC commissioned a study of the occupational standards for the DDT position by Lutheran Hospital's rehabilitation specialists. The study concluded that the DDT position required frequent lifting of heavy weights, bending and twisting.

8. The study concluded that essential physical functions of the DDT position includes the requirement to lift and carry 50 pounds every ten minutes, and bending and twisting at the waist for two hours at a time and four hours total during a shift. These essential functions have been applied equally to all DDT positions at WRRC.

9. The requirement that a DDT lift 50 pounds can arise during a fire drill, during an actual fire or during another type of emergency necessitating the evacuation of clients from a residence. Other occasions when lifting a client may be required are when a client has a seizure or engages in behavior which jeopardizes the safety or well being of the client or others. Satellite homes are staffed with two employees on the first and second shifts, and with one employee on the third shift. With the

limited staffing of the satellite homes, the physical function requirements insure client safety and welfare.

10. At the direction of Venta's physician, she was unable to perform these essential physical functions, thus necessitating her assignment to modified duty in July, 1992. On modified duty, Venta was assigned to work at Sunshine Hall, Secrest, the infirmary and at the Summit, another location where clients were provided care. Venta provided limited direct care to ambulatory and non-ambulatory WRRC clients. Venta groomed, dressed, changed the clothes of, fed and moved clients. Additional duties performed following her injury include being on her feet a lot, walking a lot and changing beds daily.

11. While on modified duty, Venta made two requests for reasonable accommodation. The first was in a handwritten note, dated March 8, 1993, in which she asked to be admitted to a cook training class. She was not admitted to the class because she failed to meet the minimum qualifications for the cook position. The minimum qualifications of the class specification for cook I require experience as a food service worker. Venta's employment applications during her tenure at WRRC did not identify any prior experience in food services.

12. A second request for reasonable accommodation was made in writing on May 26, 1993. Following the second request for reasonable accommodation, Vernon Jackson, the American's with Disabilities Act coordinator, sent Venta's supervisor, David Colagrosso, a memo asking him to determine whether there was any way Venta could be assisted in lifting and bending in her job functions as a DDT. Colagrosso concluded that there are no positions at WRRC for which Venta was qualified that did not require lifting, bending or twisting. Colagrosso further concluded that there are no method available to assist Venta in duties related to lifting, bending and twisting.

13. In June, 1993, Venta began a modified duty assignment at Secrest. Colagrosso advised Venta in writing that she was to limit her activity at the house within the restrictions defined by her physician. Venta's duties at Secrest included dressing and feeding clients, helping with breakfast, loading clients into the van and taking the clients to programming.

14. On June 29, 1993, after Venta had been on modified duty for one year, she was placed on leave. Venta was advised in a letter from Vernon Jackson that the ADA committee had been unable to find a suitable position for her in response to her request for a reasonable accommodation. There are no DDT positions at WRRC where lifting less than 20 pounds, or bending and twisting at the waist are not required. Jackson advised Venta in the letter that she would be placed on leave until such time as a suitable

position was located for her or she exhausted her accrued leave and was terminated from her position.

15. On June 30, 1993, the day Venta was placed on leave, she accepted employment with the Colorado Federation of Public Employees working as an employee business representative for that union. Venta remained employed in her position as a business representative until at least the date of the hearing in this matter.

16. In Venta's position with the Colorado Federation of Public Employees, Venta received five hundred dollars per month more in compensation than she received as a DDT.

17. Following exhaustion of all of Venta's sick and annual leave, on August 26, 1993, Carl Schutter, the appointing authority, terminated her employment with WRRC as a DDT.

DISCUSSION

Complainant's case is premised on her contention that respondent violated the Act by discriminating against her on the basis of her disability. One seeking to establish a case of discrimination because of a disability under the Act has the burden to show that he is disabled, that he is otherwise qualified to do the job in question, and that he was terminated or otherwise suffered an adverse employment action because of his disability. Colorado Civil Rights Commission v. North Washington Fire Protection District, 772 P.2d 70 (Colo. 1989)

When a prima facie case of employment discrimination is established, the employer must then show that there is no reasonable accommodation that the employer can make, that the disability actually disqualifies the individual from the job, and that the disability has a significant impact on the job. If an employer presents credible evidence that a reasonable accommodation is not possible, the employee must then present evidence of his particular capabilities or other possible accommodations. Colorado Civil Rights Commission v. North Washington Fire Protection District, supra.

Complainant argued that she is an individual with a disability and that the agency action in failing to provide her a reasonable accommodation for that disability was discriminatory. Further, complainant argues that respondent's action in requiring her to assume leave status on June 30, 1993 was arbitrary, capricious, and contrary to rule or law. Finally, complainant asserts that the termination of her employment following exhaustion of her sick and annual leave was also arbitrary, capricious, and contrary to rule or law as well as discriminates against her on the basis of her disability.

Complainant's primary assertion is that respondent does maintain ambulatory and non ambulatory facilities at WRRC. Complainant contends that in an satellite home with ambulatory clients the lifting, twisting and bending required would be limited and that respondent could make a reasonable accommodation to assist her in those duties.

Respondent contends that complainant is not an individual with a disability. Respondent argues that a physical impairment is one that substantially limits one or more major life activities. Respondent contends that complainant was not substantially limited by her back injury. Respondent further contends that evidence of the fact that complainant was not substantially limited in one or more major life activities is shown by the fact that following respondent's action of placing complainant on leave status, complainant accepted a position with the Colorado Federation of Public Employees earning five hundred dollars per month more than she had earned in her previous position.

Respondent further contends that if it is found that complainant is an individual with a disability then it should be found that she could not be reasonably accommodated. It is respondent's position that there are no ambulatory and non ambulatory satellite homes at WRRC. Therefore, complainant's expectation that she could be placed in an ambulatory satellite home, where she maintains she would have less frequent occasions to lift, bend or twist, is not feasible. Respondent further contends that personnel even in ambulatory facilities are expected to exert themselves physically, lifting more than 20 pounds and bending and twisting at the waist on a routine basis. Respondent maintains that its occupational standards are a business necessity which ensure the quality of care provided clients.

Finally, respondent contends that the decisions to place complainant on leave and the decision to terminate her employment are neither arbitrary, capricious, contrary to rule or law nor discriminatory. Respondent maintains that the action of the agency should be sustained.

Viewing the totality of the evidence presented at hearing, it is clear that complainant is not an individual with a disability substantially affecting one or more major life activities. Complainant injured her back and could not lift or bend and twist at the waist. This condition disqualified her from the DDT position. However, there was no evidence that it disqualified her from a broad range of jobs in various classes.

The court stated in the North Washington Fire Protection District case that,

The degree to which an impairment substantially limits an

> individual's employment potential must be determined on a case by case basis with reference to a number of factors, including the number and types of jobs from which the impaired applicant is disqualified, the geographical area to which the impaired applicant has access, and the expectations and training of the applicant. Id. at 77.

Evidence of the type described above was not presented at hearing by complainant. However, what was revealed to respondent for the first time by complainant at hearing was that she departed her employment with WRRC on June 29, 1993, and started working at a job paying significantly more the following day. While complainant may not be able to perform the essential functions of the DDT position, and she lacked the minimum qualifications for the cook position, this clearly did not constitute disqualification from a broad range of job classifications, as evidenced by her immediate employment elsewhere.

Furthermore, there was no evidence that complainant was regarded by respondent as an individual with a disability within the meaning of the Act merely because respondent removed complainant from modified duty and placed her on leave. Respondent's perception that complainant was unable to perform the DDT job duties does not confer on complainant a disability within the meaning of the Act. Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992).

In 1992, Complainant presented respondent with a doctor's statement which provided for work restrictions. Respondent used good faith efforts to keep complainant, an admittedly competent employee, in its employ for at least a year, while job alternatives were explored. Respondent could not be expected to force complainant to perform DDT duties of lifting, bending and twisting, contrary to her physician's instructions, for the purpose of defending its actions in this type of case. Respondent had to acknowledge complainant's physical limitations and take action consistent with the law.

Assuming that complainant was a qualified individual with a disability substantially limiting one or more major life functions, respondent was not required to eliminate an essential job function of the DDT position in order to offer complainant a reasonable accommodation. Coski v. City and County of Denver, 795 P.2d 1364 (Colo. App. 1990). The evidence presented at hearing amply supports respondent's assertion that the lifting requirement for the DDT position was an essential job function.

The Court, in Coski v. City and County of Denver, supra, explained that,

A reasonable accommodation is one that strikes a balance

> between the legislative intent of protecting handicapped persons from employment discrimination and the legitimate concern of an employer for ensuring the safety of its employees and those with whom they are in contact. [Citation omitted.]

> Neither a fundamental alteration in the nature of the job nor the elimination of an essential job function are reasonable accommodations. The waiver of a job requirement is not a reasonable accommodation if such waiver would jeopardize public safety. [Citations omitted.]

The ALJ has considered complainant's argument that it was arbitrary, capricious and contrary to rule or law for Vernon Jackson to notify complainant of the ADA committee's decision with regard to her requests for reasonable accommodation and the decision to place her on leave. Having considered complainant's arguments, the claim with regard to this issue is deemed to be without merit.

Carl Schutter ultimately exercised appointing authority to administratively terminate complainant's employment. The ALJ knows of no authority, and complainant cites none, for the proposition that she is entitled to relief based on Jackson's notice to her regarding her leave status.

Respondent argues that the ALJ is without jurisdiction to consider complainant's petition for hearing with the appeal of her termination. Respondent argues that the cases should not have been consolidated. Respondent maintains that complainant did not have a right to a hearing in Case No. 94G019, and should have been required to petition for a hearing. These arguments too have been considered and deemed to be without merit.

Respondent seeks to cause a result not intended by the State Personnel Board Rules. In this case, the issues raised by complainant's petition for hearing are directly related to the issues raised in the appeal of the termination. To require complainant to petition for a hearing on the issues raised by her grievance, while the hearing goes forward on the appeal of her termination, would not serve judicial economy nor would it permit an orderly and logical review and disposition of the issues raised in these cases.

There was no evidence presented at hearing to sustain a finding that either party is entitled to attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol 10B).

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction to consider the petition for hearing.

2. The decision to place complainant on leave in June, 1993, was neither arbitrary, capricious nor contrary to rule or law.

3. Complainant was not a qualified individual with a disability substantially affecting one or more major life activities.

4. Respondent did not discriminate against complainant on the basis of a disability when it concluded that it could not offer her a reasonable accommodation.

5. Neither party is entitled to an award of attorney fees.

ORDER

Respondent's action is affirmed. The appeal is dismissed with prejudiced.

DATED this _____ day of March, 1995, at Denver, Colorado.

_____
Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Karen Yablonski-Toll, Esq.
Boyle, Tyburski, Yoll and Rosenblatt
3773 Cherry Creek Drive North, Ste. 940
Denver, CO 80209

and in the interagency mail, addressed as follows:

Stacy Worthington
Assistant Attorney General
Department of Law
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1525 Sherman St., 5th Floor
Denver, CO 80203

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